Petition

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81-1455

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 1981
No._____

H.Gordon Howard,
Petitioner
Pro se

V.

The Board of County Commissioners of the County of Weld, Colorado; and The Weld County Zoning and Planning Commission; and TheWeld County Department of Building Inspection,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Federal Cirtuit Court of Appeals has decided a federal question on zoning ordinances in a way in conflict with the decisions of the U.S. Supreme Court in the case of Nectow Vs. The City of Cambridge, 48 Sup. Ct. 447, 448, 277 U. S. 183, 2 L.Ed. 842, and also in conflict with the decision of the U.S. Supreme Court case of State of Washington ex rel. Seattle Title Trust Co. Vs. Roberge, 278 U.S. 116, 49 Sup. Ct. 50, 73 L.Ed. 210, isn't the decision of said Circuit Court arbitrary, erroneous, and reversible, and a clear abuse of discretion?

2. Where the U.S.Circuit Court for The Tenth circuit has so far departed from the acceptable and usual prevailing course of judicial proceedings and judgments, and has sanctioned such a departure by the U.S. District Court for Colorado, does this unreasonable abuse of discretion call for the Court's power of supervision?

3. Can the U.S. Court of Appeals for the Tenth circuit deny the plaintiff below, and the petitioner herein, the right to a jury trial that was properly and timely demanded pursuant to Rule 38 of the F.R.C.P., and the Seventh Amendment to the U.S. Constitution, by rendering a decision in

conflict with the decision of the U.S. Circuit Court of Appeals in the case of Bass Vs. Hoagland, 172 Fed. 2nd 205, 208, 209, in which latter case certiorari was denied in 70 Sup.Ct. 57, 338 U.S. 816, 94 L.Ed. 494 ?

4. Can the County of Weld,Colorado, by its zoning laws, arbitrarily refuse to recognize vested pre-existing uses and property rights; and refuse to recognize any use of County area land, outside of city limits, except for agricultural purposes, or purposes for subdivision and development of land in agricultural areas for sale in parcels by fast-buck seeking promotional developers ?

5. Is not the public interest, welfare, and need for domestic housing, in the present depressed and unattainable real estate home market more important and vital to the U.S. citizenry than arbitrary, unreasonable zoning restrictions that are not justified under the police power, and which impose unnecessary and unreasonable restrictions on the use of private property, and the welfare of public homeseekers?

6. Is a Motion for Summary Judgment a trial ? The Circuit Court of Appeals for the 10th Circuit accepted a motion by

plaintiff below for a hearing of his summary judgment request as the equivalent of, or a substitute for a jury trial that plaintiff below had demanded, properly and timely. Plaintiff was denied a jury trial.

NOTE ABOUT PARTIES IN THIS PROCEEDING IN THIS COURT WHOSE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IS SOUGHT TO BE REVIEWED.

The caption of the case in this Court contains the names of all the parties to this proceeding in this Court herein, who were parties to the judgment in the Circuit Court of Appeals for the 10th Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

H. GORDON HOWARD,

Petitioner,
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TheBoard of County Commissioners of the County ofWeld ,Colorado; and the Weld County Zoning and Planning Commission; and the Weld County Department of Building Inspection,

Respondents.

PETITION FOR CERTIORARI

The Petitioner for Certiorai, H.Gordon Howard, respectfully prays that a Writ of Certiorai issue to Review the Judgment of The United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 4th 1981, and filed in appellate case therein under No. 80-2188.

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OPINIONS BELOW:

THE U.S. Court of Appeals for the 10th Circuit entered its judgment and filed it on November 4th 1981 in Appellate Case No. 80-2188, and its order directed that the mandate shall issue forthwith. This opinion and judgment is set forth in Appendix A-1, infra. The opinion of the U.S. District Court for Colorado in case No. 79-K-1408 was filed on November 3, 1980 and is found in Appendix- A-2 of this petition , infra.

GROUNDS UPON WHICH JURISDICTION OF THE COURT IS INVOKED:

1. The petitioner herein invokes this court's jurisdiction pursuant to Title 28 U.S.C.A., Section 1331, and in connection therewith invokes the jurisdiction of this Court under the following federal laws, to wit:

(1) Title 28 U.S.C.A., Section 2201, the federal declaratory judgment statute; and

(2) Rule 56 of the F.R.C.P. , involving Summary Judgment for the plaintiff below, who is petitioner herein.

CONSTITUTIONAL PROVISIONS AND ORDINANCES AND REGULATIONS, ARE AS FOLLOWS, TO WIT;

1. The 14th Amendment to the Constitution of the U.S., which provides in part, pertinent to the issues herein, as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Weld County,Colorado zoning ordinances are in conflict with and are a denial and deprival of the rights guaranteed to petitioner herein by the 14th Amendment to the U.S.Constitution. Sections 3.3.B and 6.1 (2) and 7.5 of the said ordinances provide that no business can be started, established, or conducted in the open agricultural areas of Weld County,Colorado, because all open, raw, and unimproved farm land in the County can only be used for agricultural pursuits. The said agricultural zoning ordinance is set forth as plaintiff's exhibit No. 1, which was attached to plaintiff's supplementary complaint in Civil Action

No. 79- K-1408 of the U.S. District Court for Colorado, wherein this cause of action had its inception. The petitioner herein will request the Clerk of the Court of Appeals for the 10th Circuit to certify up the record, and to provide for its transmission to this Court herein, as provided by Rule 19 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE FACTS IN THIS CASE:

The basis for federal jurisdiction in the U.S. District Court for Colorado was as follows:

The original jurisdiction was based upon Title 28 U.S.C.A., Section 1331, and upon the violation and denial of petitioner's rights to due process of law, pursuant to the protection guaranteed by the 14th Amendment to the U.S. Constitution.

The plaintiff below, who is petitioner herein, make a motion for Summary Judgment under the provisions of Rule 56 of the F.R.C.P., and in said motion asked the trial court for a declaration that the County zoning ordinances and resolutions of Weld County, Colorado were in conflict with plaintiff below's rights under the 14th Amendment to the U.S.Constitution, and were

therefore invalid and unconstitutional.

The trial judge denied the petitioner herein a jury trial, which had been properly and timely demanded under the provisions of the 7th Amendment to the U.S.Constitution, and under Rule 38 of the F.R.C.P. The trial judge asked the plaintiff below to argue his Motion for Summary Judgment, stating substantially: "Mr. Howard I want you to argue your motion for summary judgment now, so that this court may be apprized as to the issues of law that may come up in this case, and rule more wisely on your motion for summary judgment. Will you do so?" The plaintiff below , consented to the court's request, and took the witness stand on his motion, and in support of his motion for summary judgment, the plaintiff was allowed by the court to give oral testimony under the provisions of rule 43 (e),Evidence on motions under the F.R.C.P. for District Courts of the U.S., which said Rule 43 (e)F.R.C.P. provides in part: "But the court may direct that the matter may be heard wholly or partly on oral testimony."

Plaintiff below therefore resorted with the court's approval and consent to using oral testimony from the witness stand in place of affidavits.

Plaintiff testified to having had trailer court and campground licenses from the State of Colorado for from 6 to 8 years before the County of Weld, Colorado, passed a zoning irdubabce regulation. In other words, plaintiff proved that he had a pre-existing vested use on his whole 122 ares of ranchland, which he has used for a mobile home park, a RV Park, and a campground for many years under Colorado State licenses, prior to the passage of any Weld County, Colorado agricultural zoning ordinances.

Plaintiff orally argued to the court below the case of Nectow Vs. City of Cambridge, 48 Sup.Ct. 447 , 448, 277 U.S. 183, 188, and 2 L.Ed. 842. The said case established the law that governs the present issues that the plaintiff raised concerning facts and law applicable to the present Writ of Certiorari herein. The Nectow Vs. City of Cambridge, cited supra, held that:

1. A zoning ordinance having no substantial relationship to the public

health, the public morals, the public safety, or the public welfare in its proper sense constitutes an arbitrary, unreasonable, and capricious exercise by the zoning authorities, and is therefore unconstitutional as an invasion of the property owners rights and is within the ban of the Fourteenth Amendment, and cannot be sustained.

The Weld County , Colorado, zoning ordinances are arbitrary, unreasonable, and confiscatory. The issue herein presented by the petitioner is of utmost importance, because the petitioner Howard originally surveyed out, and staked out for the use of mobile homes all the roads on the land, and gravelled the same; and the Petitioner herein invested thousands of dollars to obtain an unlimited supply of natural gas, and a public supply of public water that was unexcelled for potability for the use of mobile homes, and the petitioner's sewer and water lines all meet the top standards set up by the U.S. Government for mobile home parks. Furthermore, there is a dire need for, and a lack of available public housing, so that the only affordable public housing for poor families in petitioner's area is by spaces set up in mobile home parks.

Tenants with children cannot find any place to live, because landlords generally will not accept children in a situation where the supply of living accomodations is practically non-existant. The poorer people, who cannot qualify and pay the high interest rates for conventional and stick-housing, and who cannot find a place to live or rent, which is open to them, can find mobile home housing with plaintiff, if the unconstitutional restrictions of the Weld County zoning ordinance are declared invalid and void. These poorer people are suffering, and are in want of roofs over their heads. Petitioner can supply reasonable and adequately desired housing for these citizens and families, but the County of Weld does not care about the safety, the public morals, the public health, or the public welfare of less affluent people. On the other hand, the zoning ordinance of Weld County,Colorado, has placed the activity of growing a few acres of crops as a priority, above the welfare and health and safety of the people. Since when is a few acres of alfalfa, corn, or grain, more important than the welfare, health, safety, and morals of the citizens of the United States?

The survival and comfort of people and their children surely seems to this petitioner herein to be more important than the growing of a few acres of crops.

The situation is grave since people who cannot find affordable housing get sick, suffer, and die. People are finding themselves in a great depression, and a cruel, unreasonable, and arbitrary, and capricious zoning ordinance like that of Weld,County,Colorado prevents them from finding lodging, housing, or any comforts of home and shelter, such as petitioner herein could supply to them in warm, comfortable , cheerful mobile home space living.

Many states, other than Colorado, have followed the decisions in Nectow VS. City of Cambridge, 48 Sup. Ct.447, 277 U.S. 183, and in the case of Washington Ex. Rel. Seattle Trust Co. Vs. Roberge, 278 U.S. 116, 49 Sup.Ct. 50, 73 L.Ed. 210. However, the Weld County,Colorado zoning ordinances are in direct conflict with the rulings of the aforementioned cases, and the said ordinance is arbitrary, unreasonable, cruel, and capricious.

The plaintiff below presented to the trial court on his motion for summary

judgment the case of Stevens Vs. Stillman and the Town of Clarence, 186 N.Y.S. 2nd 327, which said case quotes the case law decided in the two U.S. Supreme Court Cases decided immediately supra of 277 U.S. 183, and 278 U.S. 116.

The case of Stevens Vs. Stillman and the Town of Clarence, 186 N.Y.S. 2nd 327 held: "An ordinance prohibiting the erection and operation of a trailer park in agricultural districts is unconstitutional, because it is not necessary or justifiable to prohibit trailer parks in an agricultural district insofar as public health, public safety, or public welfare is concerned.

The Supreme Court of Michigan in the case of Wilkins Vs. Birch Run,Et. Al. 209 N.W. 2nd 863, 48 Mich.App. 57, held: "Mobile home parks bear a substantial, real, and beneficial relationship to the public health and safety, and welfare of the community, so as to afford a preferred status in zoning."

The trial judge at the end of the hearing on summary judgment, decided that the case had been tried to the court, when it hadn't because a motion for summary judgment is not a trial.

Furthermore, the only hearing on Nov. 3, 1980 before Judge John Kane, Jr. was on a hearing of motions, namely a motion objecting to any court trial to the court on the ground that plaintiff had timely and properly requested a jury trial, and had around three expert witnesses, and five lay witnesses that he wanted to have testify before the jury that he had requested; and the other motion was a motion for summary judgment , mentioned supra. .The transcript of the hearing of motions in Civil Action No. 79-K-1408 of the U.S.District Court for Colorado in the trial below was taken on appeal to the U.S.Circuit Court of Appeals for the 10th Circuit in appellate case No. 20-2118 herein and is lodged in said court files of the said appellate case.

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI:

THE Court of appeals had reversed the district court in allowing abstention against the respondents herein in case No. 80-1208, filed August 4th 1980, and the appellate court remanded the case for trial. Plaintiff below had timely and properly requested a jury trial.

Therefore, the refusal of judge John Kane, Jr. to allow the petitioner herein to have a jury trial was void, illegal, and unconstitutional as a conflict with the Seventh Amendment to the U.S. Constitution. Hence, when on November 3, 1980, the motion of plaintiff below for summary judgment was called up for hearing and heard by the court, Judge Kane erred capriciously, arbitrarily, and abused his legal discretion, in calling a hearing on a motion for summary judgment a trial to the court, since a hearing on a summary judgment motion is not a trial, citing: Cohen Vs. Eleven West 42nd Street, 115 Fed. 2nd 521; and Prudential Ins. Co. Vs. Goldstein, 43 Fed. Supp. 767.

The conclusion of the circuit court below that petitioner's case was an equity case is arbitrary, unreasonable, and a total miscarriage of justice and discretion. An attack on an unconstitutional zoning ordinance as being in conflict with the 14th Amendment to the U.S.Constitution, pursuant to Title 28 U.S.C.A.,Section 1331, raises a question of fact as to federal jurisdiction, citing Arvida Vs. Boca Raton, 59 F.R.D. 316, and Stevens Vs. Plano, 375 Fed. Supp. 985.

Since the trial court did not grant summary judgment to the plaintiff below, it was the obligation of the court to proceed with a jury trial, and to order the trial set to determine the facts adducible by testimony of witnesses, documents , and other admissible factual evidence, citing Rule 57 F.R.C.P.

There was no trial at all. There was only a hearing on motions as will be revealed by the transcript of the shorthand reporter which is on file in the Circuit Court case No. 80-1408 for the 10th Circuit. The trial court by mislabeling the hearing on the motion for summary judgment a trial committed an arbitrary and injust abuse of discretion, citing: Cohen Vs. Eleven West 42 nd Street, 115 Fed. 2nd 521, which case holds that a hearing on a summary judgment motion is not a trial.

The Circuit Court below in its judgment argued that the petitioner has made no effort to obtain a permit to expand his trailer park. This conclusion is false, because about two years before filing petitioner's suit in the federal

courts in this action herein, petitioner herein applied for zoning in an effort to meet an agreement that was satisfactory to himself and the Weld County,Colorado zoning board. The board turned the petitioner down, telling him that the only zoning allowable in Weld County, Colorado was for the subdividing and developing and sale of lots to prospective buyers. It is illegal and unconstitutional for a county like Weld County,Colorado, to deprive the petitioner herein of his constitutional rights under the 14th Amendment to the U.S.Constitution to devote his real estate to any legitimate purpose and essential purpose for public use, as decided by Nectow Vs. City of Cambridge, 277 U.S. 183, 28 Sup.Ct. 447, 72 L.Ed. 842, and by the case of State of Washington ex. rel. SeattleTrust Co. Vs. Roberge, 278 U.S. 116, 49 Sup. Ct.50, 73 L.Ed. 210, supra. A zoning restriction that requires a person to sell off his property, and get out of the county is unreasonable, arbitrary, capricious, and destructive of petitioner's right to own property.

Plaintiff in a discussion with

Thomas O. David, Weld County attorney, was told by David that the County would not allow any expansion of plaintiff's mobile home park, and he didn't care what the plaintiff did, since the Supreme Court of the U.S. hardly ever grants a hearing on a petition for a writ of certiorari, which means that the County of Weld, Colorado, can do as it pleases. Therefore, any application to the county would be useless, and futile.

The decision of the circuit court for the 10th circuit is in conflict with all state supreme court decisions on zoning, because:

1. The case of Hillsborough County Vs. Twin Lakes Mobile Home Park, 153 So. 2nd 64,67, held: "Zoning a mobile home park owner out of a land area that is predominately and primarily agricultural had no substantial relation to public health, safety, morals, or general welfare, and the zoning ordinance is therefore arbitrary, unreasonable, and unconstitutional.

2. The case of Gust Vs. Canton, 70 N.W. 2nd 772 held that a trailer park in an open, agricultural area cannot be prohibited by zoning, since such a

trailer park is not detrimental to public health, safety, morals, or general welfare, and therefore the zoning ordinance is invalid and unconstitutional.

3. In the case of Surowitz Vs. Township of White Lake, 213 N.W.2nd 273, 50 Mich. App. 408, the plaintiff brought an action challenging the constitutionality of the zoning ordinance. The court held that property in an agricultural, rolling area including one small lake, which could not be properly farmed, cannot be prohibited for use as a trailer park, where the defendant's zoning ordinance restricted the plaintiff's land to agricultural purposes. Plaintiff's suit herein is exactly and precisely on all fours on the facts, the law, the questions involved, etc., with the case of Surowitz vs. Township of White Lake, cited supra as 213 N.W. 2nd 273.

The case of Seidelman vs. County of Kane, 215 N.E. 2nd 822, 68 Ill. App. 2nd 255, held: "Expansion of a trailer park does not create a detrimental effect on surrounding properties, and the county agricultural zoning ordinance is unconstitutional since a trailer park is

not detrimental to public health, safety, morals, or general welfare, but is, on the other hand, beneficial to the public and the public welfare.

The U. S.Circuit Court for the 10th Circuit claimed that the petitioner herein had to exhaust administrative remedies by applying for a zoning permit, and has not done so. This is a false assertion, as shown hereinabove supra herein, and is also a wrongful abuse of judicial discretion, and a substantial error of decision and discretion, because:

A plaintiff need not exhaust administrative remedies prior to seeking relief against municipalities, or counties , under Title 28 U.S.C.A., Section 1331, citing the following cases in petitioner Howard's favor herein, to wit:

(1) Spencer Vs. Town of Westerly, 430 Fed. Supp. 636; and

(2) Southern Californai Telephone Co. Vs. Hopkins, 13 Fed. 2nd 814, aff'd 48 Sup.Ct. 180, 275 U.S. 393, 72 L.Ed. 329, and

(3) Bell Vs. Waterfront Commission of N.Y. Harbourd, 183 Fed.Supp. 175, aff'd 279 Fed. 2nd 853, and

(4) Lastly, petitioner herein was entitled to a jury trial on the factual issues as decided by the case of Bass Vs. Hoagland, 172 Fed. 2nd 205, 208, 209, in which certiorari was denied in 70 Sup.Ct. 57, 338 U.S. 816, 94 L.Ed. 494, wherein the court held that a denial of a right to a jury trial, after a demand is made therefor in the federal court, is an unconstitutional abuse of discretion and power, and this is so in the absence of a waiver. Plaintiff below never waived his right to a jury trial. The case of Bass Vs. Hoagland, cited supra also held; " A judgment entered in either a civil , or criminal , case, reached without due process of law is without jurisdiction, and is void, both under the Seventh Amendment to the U.S.Constitution, and rule 38 of the F.R. C.P. for U. S. District Courts.

The case of La Salle National Bank Vs. The County of Will, 347 N.E. 2nd 854, 38 Ill App. 3rd 622, held: "Where public need existed in the area for low cost housing, which would be served by the use of a mobile home park, the agricultural zoning ordinance of the county forbidding mobile home parks in

agricultural areas of the county was unconstitutional, since the said ordinance bore no substantial relation to public welfare.

CONCLUSION:

FOR THE foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the 10th Circuit, and the said court's judgment should be reversed.

Respectfully Submitted,

H.Gordon Howard,
Owner of Pine Lake Resort and Campground, and Petitioner herein,

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APPENDIX A-1

11-4-81 80-2188

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HOWARD'S PINE LAKE RESORT AND CAMPGROUND, AND H. GORDON HOWARD, OWNER THEREOF,

Plaintiff-appellant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, COLORADO; AND THE WELD COUNTY ZONING AND PLANNING COMMISSION; AND THE WELD COUNTY DEPARTMENT OF BUILDING INSPECTION,

Defendants-appellees.

Appellate No. 80-2188

Appeal from the U.S.District Court for the District of Colorado

(D.C. No. 79-K-1408)

Submitted on briefs pursuant to 10th Circuit Rule 9:

H.Gordon Howard, Pro Se,

Thomas O.David, Weld County Atty. Greeley,Colorado, for defendants-appellees.

BEfore Seth, Chief Judge, Pickett and Seymour,Circuit Judges.

FILED U.S.Court of Appeqls 10th Circuit
Nov. 04, 1981
Howard K. Phillips, Clerk
No. 80-2188

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unamimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34 (a) 10th Circuit R. 10 (e). The cause is therefore ordered submitted without oral argument.

Appellant, H.Gordon Howard, appeals from the district court's dismissal of his action challenging the constitutionality of Weld County,Colorado, zoning ordinances. Jurisdiction is asserted under 28 U.S.C. ,Section 1331.

This case was previously before us on appeal from the district court's original decision to abstain and to dismiss the case. We found this action to be an inappropriate candidate for application of the abstention doctrine and reversed and remanded to the district court. See Howard's Pine Lake Resort and Campground Vs. the Board of County Commissioners, No. 80-1208 (10th) Cir., filed August 4, 1980.

Subsequently the case was tried to

the court, despite appellant's request for a jury trial. The action was dismissed on the merits.

The threshhold inquiry is whether the district court properly denied appellant's request for a jury trial. It is well known that the right to a jury trial exists only in actions at law dealing with legal rights rather than those at equity and only with respect to disputed issues of fact. See,e.q. Ross Vs. Bernhard, 396 U.S. 531 (1970) , Dairy Queen, Inc. Vs. Wood, 369 U.S. 469 (1962); Beacon Threatres Inc. Vs. Westover, 359 U.S. 500 (1959). Here the only issue is the constitutionality of the zoning ordinance, which would entitle the appellant to equitable relief only and which does not involve disputed issues of fact. We conclude th-t it was not improper for the district court to deny appellant's request for a jury trial.

Appellant challenges the constitutionality of the zoning ordinances and their application to his business. He asserts that the zoning ordinances amount to a taking of his property without due process of law.

Appellant apparently owned his land in

Weld County prior to its being zoned for predominantly agricultural use pursuant to a comprehensive plan developed by the County of Weld, Colorado, Planning Commission. It appears that appellant desires to expand his mobile home facility for a use not specifically permitted in the agricultural zone district.

Perhaps the leading case in this area is Euclid Vs. Ambler Realty Co., 272 U.S. 365 (1926). The Supreme Court held that before a zoning ordinance could be declared unconstitutional it must be shown to be absolutely to be clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, morals, or welfare. The segregation of business, residential, and industrial development has long been recognized as bearing a rational relationship to the health, safety, and general welfare of the community. There is a legitimate governmental interest in preserving land for the agricultural needs of the community and there is a host of health and safety ramifications which we need not explore. Suffice it to say

that the restrictions are not clearly arbitrary and unreasonable and we hold that the ordinances are facially constitutional. Whether the ordinances are also constitutional in their specific application to appellant is not properly before us. Although the facts in this case are far from lucid, it appears that appellant has made no effort to obtain a permit, or make an application to the zoning board to expand the existing use of his property as provided for under the terms of the ordinances. Indeed, the record reflects that appellant has been invited to do so but has declined. There is thus no concrete controversy on the present state of the record with respect to this issue. See. Euclid Vs. Amber Company, supra; Agins Vs. Tiburon, 447 U.S. 255 (1980).

Finally, we note that appellant has filed a pleading requesting that we hold appellees in contempt of court. This petition is inappropriate for disposition before this court.

The judgment of the district court is affirmed. The mandate shall issue forthwith.

APPENDIX A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 79-K-1408

HOWARD'S PINE LAKE RESORT
AND CAMPGROUND, AND
H. GORDON HOWARD, OWNER THEREFOF,

Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO; AND THE WELD COUNTY ZONING AND PLANNING COMMISSION AND THE WELD COUNTY DEPARTMENT OF BUILDING INSPECTION

Defendants.

JUDGMENT FILED Nov. 3rd 1980.

This matter having come on regularly for trial on the 3rd day of November 1980, before the Court, the Honorable John L. Kane, Jr., Judge presiding and the Court having proceeded with a hearin on pending motions and the court having granted Poudre Valley Rural Electric Association's , Inc. motion for entry of judgment pursuant to F.R.Civ. P. 54 (b), and the matter having proceeded to trial and the Court having received testimony, exhibits, and arguments and having made findings of fact and conclusions of law, included herein by

reference, finding for the remaining defendants, it is hereby

ORDERED that judgment against the plaintiffs and for the defendants is entered; that the defendants shall have their costs upon the filing of a Bill of Costs with the Clerk of this Court within 10 days of the entry of this judgment and that this Complaint and civil action are dismissed.

Dated at Denver,Colorado, this 3rd day of November 1980.

FOR THE COURT:

James R. Manspeaker,Clerk,

By: Stephan P. Ehrlich,
Chief Deputy Clerk

FILED: November 3, 1980.

Opposition

Supreme Court, U.S.
FILED
[redacted] 23 198[illegible]
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1455

H. GORDON HOWARD,
Petitioner,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, COLORADO; and THE WELD COUNTY ZONING AND PLANNING COMMISSION; and THE WELD COUNTY DEPARTMENT OF BUILDING INSPECTION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the Board of County Commissioners of the County of Weld, Colorado; and the Weld County Zoning and Planning Commission; and the Weld County Department of Building Inspection, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case. The opinion is set forth verbatim at Appendix A-1 of Petitioner's Petition for Certiorari.

Petitioner brought an action in the United States District Court for the District of Colorado challenging the constitutionality of the Weld County, Colorado, Zoning Ordi-

nance. Jurisdiction was asserted pursuant to 28 U.S.C. §1331. The trial court denied Petitioner's Motion for a jury trial on August 27, 1980. Trial was had to the District Court on November 3, 1980. From a Judgment in favor of the Respondents, the Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the decision of the District Court on November 4, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

The District Court properly denied Petitioner's request for a jury trial. The Petitioner is challenging the constitutionality of the Zoning Ordinance of Weld County, Colorado, and a jury trial exists only in actions at law dealing with legal rights as opposed to those at equity and then only with respect to disputed issues of fact. *Ross v. Bernhard,* 396 U.S. 531 (1970); *Dairy Queen, Inc., v. Wood,* 369 U.S. 469; *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500 (1959). The only issue before the District Court was the constitutionality of the Zoning Ordinance of Weld County, Colorado, which would entitle Petitioner to equitable relief only, and which did not involve disputed issues of fact. The Tenth Circuit Court of Appeals properly upheld the Order of the trial court denying Petitioner a jury trial.

The record in this case clearly demonstrates that Petitioner has failed to prove that the Weld County, Colorado, Zoning Ordinance amounts to a taking of his property without due process of law. The case of *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), held that before a zoning ordinance could be declared unconstitutional, it must be shown to be clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, morals or welfare. The record is devoid of any evidence that the Weld County Zoning Ordinance is unconstitutional as it applies to Plaintiff.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

Petitioner's Reply Brief

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1981
No. 81-1455

H. Gordon Howard,

Petitioner,
Pro Se,

Vs.
The Board of County Commissioners of the County of Weld, Colorado; and The Weld County Zoning and Planning Commission; and TheWeld County Department of Building Inspection,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

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REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

NO. 81-1455

H. GORDON HOWARD,
PETITIONER,
PRO SE,

VS.

The Board of County Commissioners of the County of Weld, Colorado; and The Weld County Zoning and Planning Commission; and TheWeld County Department of Building Inspection,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

The Appellant, H.Gordon Howard, respectfully prays that this Court will grant his Writ of Certiorari, and will reverse the judgment and opinion of the U.S.Court of Appeals for the 10th Circuit,

entered in this proceeding on November 4th 1981, and filed in appellate case therein under No. 80-2188, on the grounds and for the reasons set forth infra herein.

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THE ARGUMENT SHOWING WHY THE RELIEF ASKED BY THE APPELLANT HOWARD HEREIN OF THIS HONORABLE COURT HEREIN SHOULD BE GRANTED.

The following set forth argument, reasons, and citations of authorities, disclose the grounds why the relief asked by the Petitioner-appellant of this Court should be granted, to wit:

1. This case herein before the trial court below involved an action pursuant to Title 28 U.S.C.A., Section 1331, raising a Federal Question. This case as filed in the trial court was a law case to be determined by evidence, such as documents, and witnesses testimony to be submitted to a jury pursuant to the provisons of the Seventh Amendment to the U.S. Constitution, Rules 38 and 39 of the F.R.C.P. for trials before U.S.District courts. The trial had timely and properly been designated on the docket of the trail court as a jury action.

A Federal Question arising pursuant to 28 U.S.C.A.,Section 1331 involves a genuine and substantial Controversy of fact, arising under the U.S.Constitution, a law, or treaty,of the U.S. , presented in such form that the judicial power is capable of acting upon it, and so directly involved in a case that a determination thereof is necessary to a decision, citing: Kansas Vs.Colorado, 206 United States 46, 51 L.Ed. 956, 27 Sup.Ct. 655, and the case of Smith Vs. Kansas City Title and Trust Co., 255 U.S. 180, 65 L.Ed. 577, 41 Sup. Ct. 243. The plaintiff's motion below for summary judgment was not a trial at all--it was merely an application incidental to the main suit, made to the judge that something be done in favor of the applicant, citing 37 Am. Jur. 1st, Motions, Section 3.

The applicant herein requested the clerk of the U.S.Circuit Court of Appeals for the 10th Circuit, one Howard K. Phillips, pursuant to Rule 13 of the Rules of the Supreme Court of the United States to certify the record from said court to this Court herein, and to provide for its full transmission , including the transcript of the final hearing in Civil Action No. 79 K 1408, of the U.S.District Court for Colorado, entitled Hearing on Motions, to

the Honorable Alexander L.Stevas , the Clerk of this Court herein. Now, since the adding of the transcript of the final proceedings of Hearings on Motion that went on appeal to the said Circuit Court of Appeals for the 10th Circuit would illegally exceed the limitations of the Reply Brief herein, as set forth in Rule 34. 3 of the Rules of the Supreme Court of the U.S.,and since appellant herein has no way of knowing whether or not the said Howard K. Phillips complied with appellant's request in sending the said transcript of Hearing on Motions pursuant to Rule 13 of this Court herein, appellant is sending under separate cover his copy of said transcript of hearing on motions to the Honorable Alexander L. Stevas with the request that it be made available for the study of this Court herein, if the judges of this Court will please look at it. It shows only a hearing on motions, and not a trial to the court, as falsely and untruthfully alleged by appellee's lawyer.

The appellant herein stated in his argument before judge John L. Kane, Jr. on the hearing of Motions for summary judgment, etc.,that under any conditions and circumstances, the appellant Howard herein held

and possessed vested rights to property in his Howard's Pine Lake Resort and Campground, consisting of a separate Mobile Home Park and campground and RV Park located on the front of appellant's 122 acre ranch, which had been licensed by the State of Colorado for from around 6 to 8 years prior to turning the licensing over to the County Commissioners of Weld County,Colorado, and its planning and zoning commission. Appellant has spent around $90,000.00 improving the said property, by development of gravelled roadways, and the bringing of Public Service Co. natural gas to the property, and the bringing of Poudre Valley electricity to the property. and the bringing of North Weld County,Colorado potable water of the finest drinking quality to the property. The state of Colorado and the County of Weld,Colorado encouraged the expenditure of the huge sum of money in the development of appellant's business, and now they are acting like weasels and foxes, slyly trying to, and intending to prevent the applicant herein from developing his property further, or renting more mobile home spaces, or expanding his livable facilities in this great depression that even baffles President Regan and Congress in trying to solve the housing shortages , in a time when

low income, and poor people, cannot find , or afford conventional, or stick-housing, and the high rates of interest charged on loans, and couldn't under any conditions quality to be acceptable on such preposterous loans. Parents, and children are going hungry and are freezing, because of people like the appellees herein, who have no sympathy or care about the welfare, health, morals, or safety of the citizens of the United States.

A vested right such as appellant herein has held for years before the Weld County Zoning ordinance was passed to develope and devote his entire 122 acre ranch into a mobile home park, through annual Colorado State licenses, is a right of which the appellant/Howard and Petitioner herein cannot be deprived of arbitrarily, without injustice, or of which he could not be deprived of otherwise than by the established methods of procedure, and for the public welfare, citing Stimson Land Co. Vs. Rawson, (C.C.Wash.) 62 Federal 429, and Cassard Vs. Tracy, 27 Southern 368, 49 L.R.A. 272, and see Am. States Water Co. Vs. Johnson, 31 Cal. App. 2nd 606, 88 Pac. 2nd 770, 774.....

A vested right is a right that is complete and consummated, and is of such character that it cannot be divested without the consent of the person to whom it belongs; and a vested right is fixed, or established, and is no longer open to controversy, citing: State Vs. Ritter's Estate, (Ind. App.), 46 N.E. Second, 736, 743. Such is the right that appellant herein holds in his property, by right of law and fact, as shown by the testimony of appellant Howard, and his exhibits, introduced as evidence in the transcript on motions for summary judgment, and jury trial, dated Nov. 3, 1980, and transcribed by Carol Patterson and Associates, Certified Shorthand Reporters of Denver, Colorado.

CONCLUSION

For the foregoing reasons, and upon the authorities and evidence presented in this Reply Brief of Appellant herein, this Honorable Court should reverse the judgment of the Circuit Court of Appeals for the 10th Circuit, and enter, adjudge, order, and decree a proper judgment in favor of appellant herein and against the appellees herein.

RESPECTFULLY SUBMITTED,

H. GORDON HOWARD,
Owner of Pine Lake Resort, and
Campground, and RV Park,

Petitioner Herein,
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